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**From:** Joe.Jennings <Joe.Jennings@knobbe.com>  
**Sent:** Wednesday, August 14, 2013 8:20 PM  
**To:** Tamburo, Salvatore  
**Cc:** Lit KFXL.064L; zz-Arthrex.KFx  
**Subject:** RE: S&N/KFx License Agreement

Sal,

KFx produced the agreement on the day it was executed. We could not have produced it any earlier.

As for the production of written communications regarding the agreement, I do not believe that any existed until recent months. In addition, negotiations are not automatically discoverable even when an agreement has been executed and produced. Thus, it certainly would not have been reasonable to expect KFx to continually produce documents about an ongoing but unresolved negotiation. Finally, although KFx believes the agreement is relevant and KFx intends to rely upon it, KFx does not intend to rely on the negotiations or take any position that would put the negotiations in dispute. Therefore, the negotiations did not become discoverable upon the execution and production of the agreement. Indeed, I do not believe that Arthrex produced negotiations from its Corkscrew agreements, for example.

With respect to relevance, the S&N license agreement is pertinent to at least secondary considerations of non-obviousness and damages. Thus, we expect that the agreement at least would be used in the direct examination of Tate Scott and George Strong. We believe the agreement may also be relevant to rebut arguments made by Arthrex.

We fail to see what discovery Arthrex would need. The agreement itself includes the information relevant to the case.

Regards,

Joe

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**From:** Tamburo, Salvatore [<mailto:TamburoS@dicksteinshapiro.com>]  
**Sent:** Tuesday, August 13, 2013 3:08 PM  
**To:** Joe.Jennings  
**Cc:** Lit KFXL.064L; zz-Arthrex.KFx  
**Subject:** S&N/KFx License Agreement

Joe

We were surprised to receive the S&N/KFx license agreement yesterday, one week before trial is scheduled to begin.

We note that KFx did not produce any documents related to this agreement, including communications with S&N and drafts of the agreement. Surely such documents must exist at both KFx and S&N, and presumably could have been produced sometime ago.

More to the point, Arthrex will obviously not have an opportunity to take full discovery (e.g., document requests to KFx, depositions of KFx, subpoenas to S&N, etc.) on the agreement before trial. Thus, Arthrex does not believe KFx should be permitted to use the agreement at the trial, and we object to any such use.

Please confirm KFx does not intend to use the agreement at the trial.

If KFx does intend to use the agreement, please explain how you intend to use it (on what issues and with which witnesses) and why KFx believes it is entitled to do so despite its last-minute production and Arthrex not having had an opportunity to take full discovery on it.

Thanks,  
Sal

**Salvatore P. Tamburo**

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